

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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74-1960

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United States Court of Appeals

For the Second Circuit

P/S

STAMICARBON, N.V.,

Plaintiff-Appellant,

v.

AMERICAN CYANAMID COMPANY,

Defendant-Appellee.

**On Appeal from the United States District Court
for the Southern District of New York**

JOINT APPENDIX

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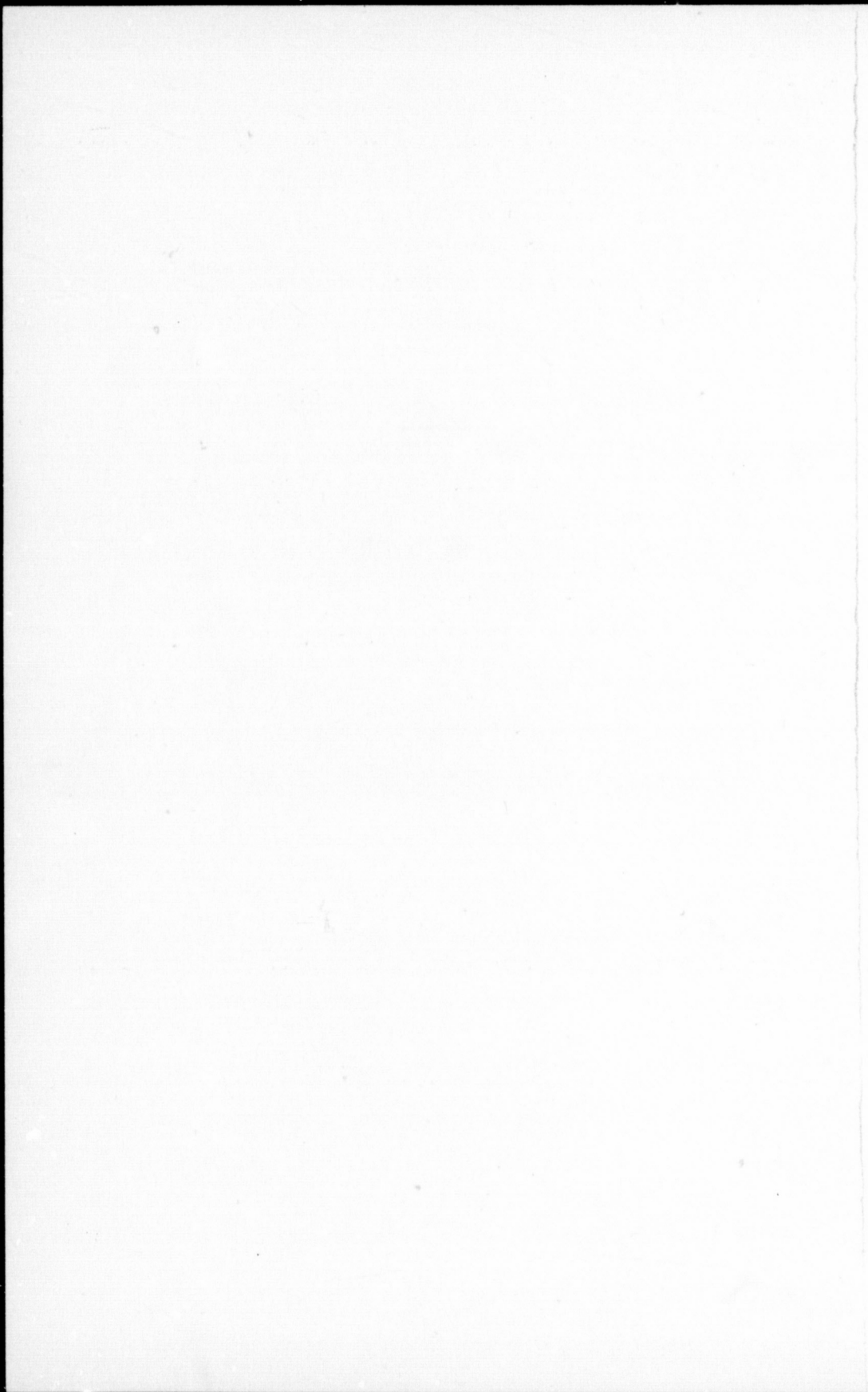
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Relevant Docket Entries

<i>Date of Entry</i>	<i>Proceedings</i>
July 12, 1974	Filed complaint and issued summons.
July 15, 1974	Filed affidavit and show cause order for preliminary injunction returnable July 15, 1975.
July 17, 1974	Filed sealed envelope as ordered by Judge Brieant, and placed in vault in cashier's office.
July 17, 1974	Filed Plaintiff's Notice of Appeal from an order of Judge Brieant denying plaintiff's motion for a preliminary injunction, etc. entered in this action on July 15, 1974. Notice mailed to: Donovan, Leisure, Newton & Irvine, Esqs., 30 Rockefeller Plaza, N.Y.C. 10020, July 22, 1974.
July 24, 1974	Filed transcript of proceedings dated July 15, 1974.

Verified Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

STAMICARBON, N.V.,

Plaintiff,

v.

AMERICAN CYANAMID COMPANY,

Defendant.

[74 Civ. 2990, Brieant, J.]

Plaintiff, by its attorneys, Ide & Haigney, for its complaint against defendant, alleges:

1. The Court has jurisdiction of this action under 28 U.S.C. Sec. 1332, as hereafter appears.

2. The venue of this action is properly laid in the Southern District of New York under 28 U.S.C. Sec. 1391 because the claim arose in such District, as hereafter appears, and defendant is a corporation doing business in such District, having an office therein at 111 West 50th Street, New York, N.Y.

3. Plaintiff Stamicarbon, N.V. (hereafter "Stamicarbon") is a corporation duly incorporated and existing under the laws of the Kingdom of The Netherlands with its principal place of business in Heerlen, The Netherlands.

Verified Complaint

4. Defendant American Cyanamid Company (hereafter "Cyanamid") is a corporation incorporated and existing under the laws of the State of Maine and having its principal place of business in Wayne, New Jersey.

5. The plaintiff is engaged in the business of exploiting secret know-how on apparatus and processes developed and obtained by it or its parent company, N.V. Nederlandse Staatsmijnen of Heerlen, The Netherlands, relating to the manufacture of melamine (hereinafter called "know-how") and in the course of such business has acquired the right to license such know-how relating to the manufacture of melamine by a process employing urea and ammonia as feedstock.

6. Such know-how has been acquired over a substantial period of time and at substantial cost and has been licensed and offered for license to licensees in various parts of the world under license agreements which require the licensee to safeguard and maintain such know-how in secrecy and not to divulge such know-how to the public. Because of these arrangements, such know-how is in fact secret and not known to the public generally. Such know-how constitutes a unique and valuable trade secret of the plaintiff. Such license agreements provide, however, that, in the event that such know-how becomes public knowledge the licensee is relieved of the obligation to continue to guard its secrecy.

7. To date, Stamicarbon has succeeded in maintaining the secrecy of such know-how and enjoys substantial revenues derived from the licensing of such know-how and contemplates executing other licenses with prospective licensees so long as such know-how has not become public knowledge.

Verified Complaint

8. The defendant Cyanamid is a party to a license agreement dated June 18, 1969 with the plaintiff, granting the right to the defendant to utilize such know-how. Pursuant to said agreement, Stamicarbon has duly divulged to Cyanamid such know-how. Cyanamid has duly constructed and is now operating a plant in accordance with such know-how.

9. As appears from Article III of said agreement, a copy of which article is attached and made a part hereof as Exhibit A hereto, Cyanamid is under the contractual obligation to Stamicarbon to "safeguard the secrecy of such know-how" and to "use its reasonably best efforts to prevent disclosure thereof to third parties."

10. Cyanamid is a defendant in a criminal contempt proceeding, the trial of which is now scheduled to begin on Monday, July 15, 1974 at 10 A.M. in this Court before Judge Brieant. The only parties to such trial are the United States Government and Cyanamid.

11. In the proceedings before Judge Brieant on July 11, 1974 a representative of Stamicarbon requested that the Court conduct such trial in a manner in which any information relating to such know-how would not be disclosed to the public. Counsel for the United States Government indicated that he would consent to a trial in such manner but counsel for Cyanamid refused to give such consent. The Court announced that it was reluctant to order that the trial be conducted in such manner unless Cyanamid consented to such procedure.

12. The consequence of Cyanamid's failure to consent to a trial in such a manner will be a public disclosure of such know-how or portions thereof with the resultant ir-

Verified Complaint

revocable destruction of Stamicarbon's valuable ownership of such know-how and ability to continue its business of licensing the same. On information and belief, the value of such know-how substantially exceeds \$1,000,000.

13. While Cyanamid may have a qualified right to a public trial, the exercise of any such right is subject to Cyanamid's said contractual obligations to Stamicarbon to safeguard the secrecy of such know-how and to use its reasonably best efforts to prevent its disclosure thereof to third parties.

14. Defendant's aforesaid refusal and its continued refusal or failure to consent that such portion of the trial of such criminal proceedings be held *in camera* constitutes a breach of its aforesaid license agreement with plaintiff.

15. Unless the continuance of such breach is enjoined and enjoined prior to the trial of such criminal proceedings, plaintiff will suffer immediate irreparable injury for which it has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment in this action enjoining the defendant from continuing to fail and refuse to consent that such portion of the trial of the aforesaid criminal proceedings as would involve disclosure of such secret know-how be conducted *in camera*, together with plaintiff's costs and disbursements of this action.

Dated: New York, N.Y.
July 12, 1974.

IDE & HAIGNEY
Attorneys for Plaintiff [Etc.]

Exhibit A to Complaint**Article III of Agreement Between Stamicarbon
and American Cyanamid****"ARTICLE III***Secrecy*

CLIENT shall treat all STAMICARBON Know-How furnished to CLIENT under this agreement as strictly confidential and shall use its reasonably best efforts to prevent disclosure thereof to third parties. CLIENT agrees to preserve and safeguard the secrecy of such Know-How with the same degree of care which CLIENT exercises in respect to holding its own proprietary information in confidence—including the causing of all such written Know-How of STAMICARBON to bear markings indicating the confidential nature thereof. CLIENT shall be permitted to disclose such Know-How only to CONTRACTOR (including subcontractors, vendors of equipment and the like) for use only in the construction or operation of the Plant. The foregoing undertaking shall not apply to the extent that such Know-How (a) according to written proof is known to Client at the time of its disclosure, or (b) is available to the public at the time of disclosure or thereafter becomes available to the public through no act or failure to act by CLIENT, or (c) is acquired by CLIENT from a third party who has a bona fide right to transmit the same to CLIENT. In the event that (a), (b) or (c) above prevails, CLIENT, nevertheless, except in connection with the assignment or transfer of this agreement permitted by Article XI and with the granting of sublicenses to CLIENT's subsidiaries, permitted by Article I, paragraph B, shall not disclose to third parties that STAMICARBON employs the Know-How falling under the scope of (a), (b) or (c) in the Stamicarbon-melamine process.

To the extent any disclosure made by STAMICARBON is specific as to range of operating conditions and/or design of equipment required for the operation of the Stamicar-

Exhibit A to Complaint

bon-melamine process, CLIENT shall not disclose such specific data, without STAMICARBON's prior written approval, even though such specific information is deductible from generalized data, or from the combining of otherwise independently isolated portions of generalized data, covered by (a), (b) and/or (c) hereof. CLIENT's obligation with respect to secrecy as provided herein shall terminate five years after start-up of the Plant or five years after the date on which confidential STAMICARBON Know-How was received by CLIENT, whichever is the latest. The undertakings with respect to secrecy contained herein, shall as from the effective date of this agreement supersede CLIENT's secrecy undertakings with respect to STAMICARBON Know-How in the field of the Stamincarbon-melamine process, dated March 26, 1969.

Verification

State of New York)
 County of New York) ss.:

JOHN E. HAIGNEY, being duly sworn deposes and says: I am an attorney admitted to practice in New York and before the United States District Court for the Southern District of New York. I am a member of the firm of Ide & Haigney, attorneys for plaintiff in this action. I have read the foregoing complaint herein. It is true to my knowledge except as to matters therein alleged upon information and belief and as to such matters, I believe it to be true. The reason this verification is made by me and not by any director, officer or employee of the plaintiff herein is that the plaintiff is a foreign corporation having no director, officer or employee thereof within the State of New York.

s/ John E. Haigney

[Sworn to July 12, 1974]

**Affidavit of John E. Haigney of July 12, 1974 in
Support of Application for Issuance of Order to
Show Cause on Motion and in Support of Motion
for Preliminary Injunction**

[SAME CAPTION]

State of New York)
County of New York) ss.:

JOHN E. HAIGNEY, being duly sworn, deposes and says:

1. I am an attorney admitted to practice before this Court and a member of the firm of Ide & Haigney, attorneys for plaintiff in this action. This affidavit is made by me, rather than by any director, officer or employee of the plaintiff because of the urgency of the situation to which plaintiff's action and this motion herein relate hereafter described and the fact that plaintiff is a Netherlands corporation, having its principal offices in Herleen, The Netherlands, having no director, officer or employee thereof is present in the Southern District of New York at this time.

2. Plaintiff's complaint herein is verified, and I respectfully request that it be considered as an affidavit in support of plaintiff's present motion and application for an order to show cause thereon.

3. As shown in the complaint, this is an action to enjoin the defendant from failing or refusing to consent that portions of a trial of a criminal proceeding now pending in this Court against defendant which would involve disclosure, whether by testimonial or documentary evidence, of valuable secret know-how, constituting a trade secret and valuable asset of the plaintiff, relating to a process

Affidavit of John E. Haigney

for manufacturing melamine which is licensed by defendant from plaintiff, be conducted *in camera*, so as to prevent public disclosure thereof to the enormous, permanent and irreparable injury to plaintiff's business.

4. The reason why such disclosure would cause permanent and irreparable injury to plaintiff's business is that its business involves the licensing of such secret know-how to licensees for royalties. Public knowledge of such secret know-how would enable chemical companies not licensed by plaintiff to freely use such know-how, which was developed over years at enormous expense by plaintiff.

5. As shown in the complaint, plaintiff's claim to be entitled to such relief is based upon defendant's contractual obligation to plaintiff as a licensee of such secret know-how to keep it secret.

6. The urgency of the need for the relief sought and the reason plaintiff seeks to bring its motion therefor on by the order to show cause sought is that the trial in such criminal proceedings is scheduled to commence in this Court on July 15, 1974 at 10 a.m. before Judge Brieant.

7. At a pre-trial conference held in such criminal proceeding before Judge Brieant on July 11, 1974, the question was raised as to whether it was likely that evidence of the process involving such secret know-how would be elicited at the trial therein. Counsel for the United States of America in such proceedings, Stephen Sonnett, Esq., of the Department of Justice of the United States, Anti-trust Division, indicated that it was likely that such evidence would be elicited in the trial therein, and consented, on behalf of the United States of America, that the portions of such trial involving disclosure of such evidence

Affidavit of John E. Haigney

be held *in camera*. The defendant therein and herein, American Cyanamid Company, refused to agree to such procedure, upon the basis of a claim that it was entitled to a public trial in such criminal proceedings under the 6th Amendment of the Constitution of the United States.

8. The essence of plaintiff's action is to force the defendant American Cyanamid Company herein to honor its contractual obligation to the plaintiff to keep such know-how secret, as it has agreed to do, since by entering into such contractual obligation with the plaintiff it has contractually waived its aforesaid constitutional right insofar as it relates to such portions of the trial in such criminal proceedings.

9. The plaintiff's need for the urgent relief sought is plain, since the object of its action will become unobtainable if the trial in such criminal proceeding takes place before its rights herein are determined. No prior application for such relief has been made.

s/ John E. Haigney

[Sworn to July 12, 1974]

Order to Show Cause

[SAME CAPTION]

WHEREAS, this is an action for an injunction restraining the defendant herein, who is allegedly a citizen of the State of Maine, by the plaintiff, who is allegedly a citizen of The Netherlands, for an injunction restraining the defendant from allegedly breaching a contractual obligation thereof to plaintiff to keep secret valuable secret know-how for the manufacture of melamine licensed by defendant from plaintiff, the value of which and of the secrecy of which from the public is allegedly in excess of \$10,000, exclusive of interest and costs, by defendant's failing or refusing to give its consent, in a criminal proceeding against it by the United States of America now pending in this Court, in 60 Civ. 3857, about to be tried herein before Judge Briant of this Court, that such part of that trial as may involve disclosure of such secret know-how be conducted *in camera*, so that such secrecy can be preserved, and

WHEREAS, the trial in such criminal proceeding by the United States of America against the defendant herein is scheduled to begin on Monday, July 15, 1974 at 10:00 a.m.

UPON presentation and consideration of the complaint herein, and the annexed affidavit of John E. Haigney, Esq., and all papers and proceedings in 60 Civ. 3857, it is

ORDERED, that a copy of this order and the papers annexed hereto and the summons and complaint herein be

Order to Show Cause

served immediately upon the defendant by 6:00 p.m., July 12, 1974 at its offices at 111 West 50th Street, New York City, New York, or at such other place as it may accept service, and copies upon its counsel in 60 Civ. 3857, Donovan, Leisure, etc., and that due return be made forthwith according to law; and it is further

ORDERED, that defendant show cause before this Court on July 15, 1974, at 9:00 a.m., at Room 619 of the Courthouse of this Court, Foley Square, New York City, New York, why an order should not be made

(a) enjoining defendant during the pendency of this action, upon such terms and conditions as the Court may deem appropriate, from failing or refusing to give its consent in the aforesaid criminal proceeding that such part of the trial therein as may involve disclosure of information relating to the process for manufacturing melamine which it has licensed from the plaintiff be conducted *in camera* in such proceedings, or granting such other or further or different relief as may be proper.

Dated at New York, N.Y.,
July 12, 1974. Issued at 4:30 p.m.

s/ Charles L. Brieant, Jr.
U.S. District Judge

**Transcript of Hearing on Motion for Preliminary
Injunction, Including District Court's Findings
and Decision or Order Thereon**

[SAME CAPTION]

July 15, 1974
9:55 a.m.

BEFORE: HON. CHARLES L. BRIEANT, JR., District Judge

APPEARANCES:

Messrs. IDE & HAIGNEY
Attorneys for the plaintiff
By: JOHN E. HAIGNEY, Esq.
RONALD M. GLICK, Esq.

Messrs. DONOVAN LEISURE NEWTON & IRVINE
Attorneys for defendant
By: SAMUEL MURPHY, Esq.
P. MICHAEL ANDERSON, Esq.

*Transcript of Hearing on
Motion for Preliminary Injunction*

The Court: Where is Mr. Sonnett?[*]

Mr. Sonnett: Here, your Honor.

The Court: If you want to appear in this motion you may.

Mr. Sonnett: Your Honor, we are not part of the motion, but I will be glad to offer my comments if requested by the Court.

The Court: All right. You are directly involved in it.

All right, Mr. Haigney.

Mr. Haigney: Your Honor, as your Honor knows, on Friday afternoon your Honor signed an order to show cause bringing on this motion and on the same day the plaintiff filed a complaint, a civil complaint based upon the secrecy agreement which it has with the defendant Cyanamid, and in turn based upon the prior days proceedings before your Honor, in which it became apparent that there was a danger of disclosure of know-how that had been developed at substantial expense by the plaintiff and which it has licensed to a number of people who are here in the courtroom, and is actively engaged in seeking to expand its licensing programs, and that the danger was that unless some method was derived, such as a hearing in camera while the proceedings that would go forward in the criminal contempt proceedings that are scheduled, were scheduled for this morning, that in the course of your Honor's doing justice in that case, we virtually have the destruction of a very valuable asset, and we struggled to find some means whereby both parties could be accommodated, the trial could go forward.

It was the suggestion of the plaintiff Stamicarbon that the proceedings be held in camera and that whatever ex-

* [added] Stephen Sonnett, Esq., of the United States Department of Justice, Antitrust Division, Washington, D.C., Attorneys for the United States Of America in 60 Civ. 3857 in the United States District Court, Southern District of New York.

*Transcript of Hearing on
Motion for Preliminary Injunction*

hibits might be offered that related to the process, be sealed and that there would therefore be no interference with that procedure.

At the hearing before your Honor on Thursday, Mr. Sonnett, for the Government, indicated that he had no objection to such proceeding. Your Honor indicated his reluctance to order an in camera proceeding in a criminal trial over the objection of the defendant.

And I think the suggestion was made that it might be possible for us to be present in the courtroom—

The Court: I think I specifically directed on the record that you and anyone else having an interest in the secrecy of the process might attend the trial and might participate on the record to the extent it is reasonably necessary to protect the secrecy, and I also asked counsel for the Government and for Cyanamid Company, how elements of the secrecy could possibly become relevant to the guilt or innocence of the defendant in this proceeding. And nobody yet has satisfied me.

I could understand how a witness might blurt out something in response to a question which might be secret or might contain elements of secrecy in it. I would want to guard against that. I would expect you and the Government and the defendant to use your best efforts to see that nothing secret came out, and if a point ever arises where a secret would be disclosed that you would take objection to the question and approach the bench and explain to me at a side bar conference why the question should not be admitted.

Mr. Haigney: That is precisely what your Honor suggested at our last hearing. My problem with that—

The Court: What's the difficulty with that procedure?

Mr. Haigney: I am very clear up to that point, your Honor. We therefore object, and at this point a ruling by your Honor, without any standing in the case. If it is

*Transcript of Hearing on
Motion for Preliminary Injunction*

implemented by an agreement of counsel that upon your Honor's ruling that we are now encroaching on the secrecy provisions that at that point the trial is in camera, I have no problem with the procedure.

The Court: We are not talking about an in camera trial. We are talking about sustaining the objection to a question on the ground that the answer would call for the disclosure of the secret and that the information is irrelevant. I really just don't see how the elements of the secrecy become relevant in this case. And I can visualize how a witness might in response to what would appear to the Court to be a perfectly innocuous question, might call forth an answer which would expose some element of the secret process.

But if such a question were asked I am certain that you and the defendant, for that matter the Government, would be alert to that possibility.

I said that you could have with you at counsel table engineering personnel who would watch these questions to see if they would give aid and comfort to those who would like to penetrate the secrecy, and I fail to see how inequity would require any additional or further relief.

I signed the order to show cause without question because of the time elements involved and because I think you ought to have official standing before the Court. But I just don't see why the procedures that have already been directed here, do not satisfy the problem.

Mr. Haigney: Your Honor, they do not satisfy it in the sense that I have the right to make an objection, but that doesn't give me any rights as to the final concluding result.

The Court: Don't you believe the Court would sustain your objection?

Mr. Haigney: I don't know.

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The Court: Because it would be my purpose to sustain an objection if the answer reasonably would call for disclosure of the process secrets.

Mr. Haigney: I am completely satisfied under those circumstances.

The Court: Because I believe the process secrets or the elements of the secrets are irrelevant.

Mr. Haigney: It may very well be that—let me tell you that there is some substance to our concern apart from what was said before, your Honor, on Thursday. I have received this morning a copy, or perhaps the original of the subpoena, directed by the Government to Premier, one of our licensees.

Among the documents that are demanded are all documents reflecting Premier's evaluation of the capacity of the Melamine plant.

Now, this is a clear indication of an intention by the Government to go into that very element. I think we have cause for alarm. But I am perfectly satisfied if your Honor states that upon—if you are satisfied, that our objection is well founded in the sense that it is impinging upon a secret that you will then guard it, I am perfectly content.

The Court: Well, I will direct each witness upon completion that he is not to disclose any elements of secrecy, and I will permit you, as I have said several times before, to appear, to sit at counsel table with an engineering staff member of your client if you want and to raise those points by objection.

I should think that that direction would be adequate. I believe that the parties can prove what capacity is, which is the big factual issue in this case, without disclosing the secret. I should certainly think they can.

Mr. Haigney: I would hope. We are under no control of that. What your Honor has said today, which was not said on Thursday, is that if we are—and you are satisfied

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that you are encroaching on the secret that the information will not go forward, I am completely content.

The Court: On the ground of relevancy. All right, you are content.

Let's see what Mr. Murphy has to say.

Mr. Murphy: Well, your Honor, this is a case of Stami-carbon against American Cyanamid Company. Since Mr. Haigney is content, I wonder if he would be disposed to withdraw his complaint against us and dismiss his complaint?

The Court: Before I ask him whether he would mark his application for injunctive relief withdrawn, I wanted to see whether the procedure which the Court proposes to follow and which Mr. Haigney says satisfies him, creates any obstacle for your client because otherwise, you see, it is so far reaching that I would have to give him perhaps a further opportunity to be heard.

Mr. Murphy: It was my recollection, I had agreed to that procedure when we were before the Court on Thursday.

The Court: Mr. Sonnett?

Mr. Sonnett: Your Honor, I have some reservations about proceeding this way.

The Court: Would you care to discuss the reservations in an off the record conference in the robing room or would you rather tell us on the record what the reservations are?

Mr. Sonnett: I think I can probably tell it on the record.

The Court: All right. What are the reservations?

Mr. Sonnett: Well, primary interest of course is the prosecution and the defense of this case, and grave reservations of allowing third parties to object to questions being asked by the Government or in fact by the defendant after jeopardy has attached to the Government's case.

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The Court: Let me say that I will only entertain objections founded on the question of possible disclosure of secrecy. I am not making Stamicarbon a general party to the litigation for all purposes.

Objections must be directed solely to the proposition that the question asked might likely elicit in the answer secret information. Of course, counsel are expected to conduct themselves in a manner which does not unduly impede the processes, and I have no reason to think Mr. Haigney would not do so.

If he does then I will alter my ruling.

Mr. Sonnett: The assumption there is that neither the Government nor the defendant will need to elicit some information which might possibly be considered proprietary information.

The Court: Secret, not necessarily proprietary.

Mr. Sonnett: Secret information. And which the Government or the defendant may wish to use to argue their points.

The Court: That's my assumption, Mr. Sonnett, that you don't need—

Mr. Sonnett: Therefore if your Honor is going to allow objections to that type of testimony and we can not guarantee at this point that a question I ask which I feel is very relevant to my case would not elicit some information which would be secret. I have purposely structure my questions to avoid that. But I can't guarantee it and I don't think Mr. Murphy can guarantee it.

What happens, your Honor, if we ask a question as to your evaluation of the capacity, and, say, there is a certain problem at the plant which one person feels does not affect the capacity and the other person does? And Mr. Murphy wishes to proceed and examine an individual on that point. And that becomes secret. Mr. Murphy says, "I can't

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defend my suit." Jeopardy has attached and the Government hasn't a chance to appeal and the case—and the testimony is stricken. So it leaves me with a grave reservation as to this type of thing.

And on general principle, I do not like third parties even for this limited purpose, intervening in a Government suit.

The Court: Well, it staggers my imagination to conceive how the precise techniques or procedures which are secret and which are known to the Government apparently, or at least to the Government's experts under a pledge of secrecy, which are known to the defendant under a pledge of secrecy, and which are known apparently to Premier under the same limit, could possibly be relevant in these proceedings.

And I would really have to get down to taking an example from you or getting some actual factual assumptions or context which would let me rule on that.

Now, if you differ with the practicality of the Court's approach, kindly offer your own suggestion. What do you propose should be done?

Mr. Sonnett: Perhaps your Honor, we should get into a much more detailed explanation of what is going to happen because I believe that I can maintain my limit, my testimony.

The Court: What do you propose? The Court has tentatively suggested or imposed a procedure here which the Court believes, and apparently Stamicarbon believes, would protect what I consider to be some bona-fide interests in secrecy. Now, if you don't like that procedure I think it is incumbent on you to come forward and suggest some better alternate method.

Mr. Sonnett: I would like, your Honor, to get a little more firmer basis as to exactly where these rulings on relevancy with respect to secrecy are going to come out.

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I may have perception now that my particular question does not deal with a secret process that Mr. Haigney would assert and perhaps convince your Honor that it is a secret process or a secret part of a process, and perhaps Mr. Murphy will seek to explore certain areas which will strike the testimony of my witness.

The Court: I am going to take a brief recess and I will see just the three of you gentlemen in the robing room.

(Counsel and the Court leave to the robing room.)

(In the robing room.) [*]

The Court: This particular portion of the record I am directing be sealed and this particular conference will be privileged because I cannot in open court find out what Mr. Sonnett is driving at. Unless he gives me some kind of factual predicate upon which to understand what we are talking about here.

Mr. Sonnett: Your Honor, if I might just bring a document in with me or —

The Court: Certainly you may be excused to get a document.

(Mr. Sonnett leaves the robing room.)

Mr. Sonnett: Your Honor, I have two parcels of documents, both of which were given to Dr. Reid by MCI, and

* [added] This portion of the transcript of the proceedings of July 15, 1974 is what is contained in the sealed envelope transmitted to the Court of Appeals as part of the record on this appeal. The parties, however, were furnished with that portion of the transcript by the Court Reporters. As reproduced here, although not so in the record, references to what the plaintiff contends are aspects of its trade secrets are deleted, and the nature of such deletions is indicated by bracketed descriptions of the deletions made.

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Motion for Preliminary Injunction*

well, I will show, for instance, Mr. Murphy I think has seen this document before and this is labeled Melamine Chemicals Inc. Monthly Operating Data, and I am showing it to Mr. Haigney. (Hanging.)

Additionally, your Honor, we have supplied American Cyanamid with internal MCI documents written by Mr. Patrick which I am showing to Mr. Murphy. These documents display proprietary, what I believe to be, proprietary information.

Mr. Murphy: Well, if you don't mind my interrupting, it seems to me there are two problems we had better keep separate here. One is proprietary information of MCI which is its problem and they have some kind of an application before the Court and the other is Mr. Haigney's secret process.

Mr. Sonnett: Your Honor, may I show these to you? (Hanging.)

The Court: It would be better if you told me what "they" means.

Mr. Sonnett: Yes, your Honor. This docket was prepared by MCI to give to Dr. Reed and you will see on the right-hand side it lists all the operating problems the plant had. It also lists operating times and production.

Now, as to the operating problems, I would believe that Mr. Murphy would wish to get into the causes and results of those problems in determining whether or not the capacity of the plant was 70 million pounds or a lesser amount as the government maintains. I don't know what Mr. Haigney's position is.

The Court: Have you seen these, Mr. Haigney?

Mr. Haigney: No, I haven't but I have some notion because we are in the middle of litigation before Judge

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Ryan in which MCI is suing Stamicarbon and at issue is whether it is their own ineptitude among other things that are causing the down-time for their own poor implementation of the license. So these impinge on the issue in which they put an \$80 million on it in that proceeding.

Mr. Sonnett: That's not the issue. The issue is whether the disclosure of these problems in open court could require secrecy. Are those problems secret or —

The Court: Isn't it true that every hardhat in the plant knows that in July 1971 they had a problem of "The 402" and had 503 pluggage that cost 6.7 percent down-time? Is this a great big secret?

Mr. Sonnett: The issue's past that, your Honor, as to why that was, and you have to get into—

Mr. Haigney: You have to get into what is plugged. When you get into what is plugged. When you get into what is plugged you have the problem of beginning to describe the process. I can understand your Honor's belief that perhaps relevance can eliminate what may be a big bugaboo here.

The Court: It's inconceivable to me that this proceeding can result in laying your process bare. Number two, it's inconceivable to me that this proceeding cannot go forward, that the courts would be powerless to deal with this problem because lurking in the factual context is a secret process.

Mr. Haigney: Well, certainly we were concerned not that it be even completely bare but that components are of equal importance. The licensees paid millions of dollars for each one of these licenses to get this.

The Court: Tell me where in this exhibit, take a few moments and look at it and tell me where in this you find information which constitutes disclosure or which would reasonably lead to disclosure of secrets.

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Mr. Haigney: I may be a little out of my department as not being a specialist on this.

The Court: Bring in your engineer. I have offered that to you already.

Mr. Haigney: The second line indicates that an ammonia [type of apparatus deleted] has been [description of method of activation deleted]. Now, a part of the process here that is unusual is the introduction of ammonia, this is a chemical reaction of ammonia, gases, [description of type of chemical having certain characteristics deleted]. Let me just indicate it—there is an [description of size and type of another apparatus deleted], [quantifying description deleted] pressures and [quantifying description deleted] temperatures. To make those gases inter-react you must have a [description of a type of chemical having certain characteristics deleted].

The [reference to that type of chemical deleted] is about [weight description deleted]; it is kept sort of in [reference to location in relation to apparatus deleted] through [description of method deleted] of ammonia that are being injected. The pressures must be kept at a critical point because the item does something rather particular in chemistry. It sublimates. When anything goes wrong it goes directly from the gaseous state to the solid state there is no intermediate liquid. To make this enormous thing operate and go depends on a lot of critical things that were worked out over a period of years.

Where you put the ammonia pressure, what the capacity of the ammonia pressure, what is happening in the [type of apparatus deleted]. Pluggage in the [name of another type of apparatus used in the process deleted]; what is a [name of same type of apparatus deleted] is a natural question.

I cannot really, I can understand your Honor's hope that somehow you avoid the relevance, but I see you coming in direct collision. Check the [name of still another type

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of apparatus deleted] and [description of method deleted]. It is considered secret information that we use a [name of type of apparatus deleted] and where we use it.

Why is it critical? Is it possible that with the use of the [name of type of apparatus deleted] that MCI, if it properly operated, wouldn't have had that trouble? You are not going to be able to avoid, if we get into this sort of argument, getting into a description of what you are talking about.

As I say, just a description of this process on a schematic diagram is absolutely overwhelming. It goes from there to there. And I appreciate your Honor's belief that it may be possible, and I am not against trying, but I do not intend to withdraw my action and I would suggest that my order to show cause, if your Honor wants to try to hold the order to show cause in suspension, let's say we finally come to our first collision. This is where I find difficulty, at this point I am raising my arms and we think we are in the secrecy. We now go into the robing room and I try to explain why it is a secret. Your Honor at that point might be faced with well what are the dimensions of this secret? You have no evidence before you as to the dimensions of the secret, unless you have some testimony. I could visualize that if your Honor—your Honor's optimism is not actually—is not realized, that we might then have to have the trial of our case to describe to your Honor what this process is that we claim is secret, so your Honor knows its ramifications. That itself would have to be in camera and that presents no—

The Court: Well, I understand that everybody in this room concedes that you have a secret process.

Mr. Haigney: They have paid a substantial amount of money for it, yes.

The Court: Don't you concede it is?

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Mr. Sennett: Yes, your Honor, but we paid a substantial amount of money—

Mr. Haigney: Sorry about that.

The Court: Nobody is going to risk a big capital investment it takes to start a Melamine plant on a pirated process, I am sure.

Mr. Haigney: That's what we—

The Court: It is cheaper to pay the money and be able to come back to the licensor and say now it doesn't work.

Mr. Haigney: Right.

The Court: So I don't think any little man sitting out there with a notebook seeing what he can steal so his principals can build this tremendous reactor and maybe they don't get some element right and it doesn't work. It is a little illogical.

Mr. Haigney: There has been a worldwide fight to see which process becomes preeminent.

The Court: I am not getting into that, and I think that the Court must recognize the secrecy here.

The problem that you have is that the Court always has the right and the possibility of being wrong and if I say to you in a conference such as we are having, well, the fact that they use ammonia certainly can't be secret, any ten year old child can watch the box cars and the tankers coming into the siding of the plant bringing the ammonia in. So the fact that you are using ammonia everybody and his brother knows. People are competing for the sale of ammonia to your licensees.

Mr. Haigney: Right.

The Court: So the fact that ammonia is introduced isn't a secret. Where it is introduced, what temperature it has when it is introduced, what pressure it has when it is introduced, those are all secret.

Mr. Haigney: I agree. But I would like to narrow this issue that we have down here. Here you have a plant and

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its capacity is going to be determined by all relevant circumstances among which are the nameplate design, or contract design, plus the actual performance. Isn't that so?

Mr. Sonnett: Yes, your Honor. Basically the government will put on witnesses which will say what methods they used to evaluate their capacity which would basically be an on-stream—how many days a year the plant will run and how many tons will be run through in a day. Which is essentially the same formulation that comes from the design. The design is designed through how much their plant—designed—plus how many days and years estimated to run.

Now, when you get into major problems, major reasons the government maintains for the low capacity of these plants is the fact that the on-stream, the number of years, number of days per year that they run is not what it was estimate when it was designed. Estimation of design is looking at similar plants and seeing if it will work.

The Court: You see the contention of the defendants is going to be that if we can go in and take charge of that plant in six months we would be making nameplate more. That's going to be the contention. And then they may well open it up because they may say to me, well, it's absolutely inexcusable that you should have your Melamine pluggage. In our plants we clean those lines out every two weeks and—so of course they had a pluggage and of course they had 14 hours down-time in March, and that's the type of defense that's going to be made if you get into that.

And you are going to have a further legal problem here precisely as what is meant by capacity.

Mr. Murphy: Then it will be part of my contention, if we are going to go ahead under any one of the security proceedings that have been suggested here, at the end when we argue to the Court that it simply could not have been

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intended that the operation and application of a consent decree would depend on our client's ability to get information which is treated with this kind of sensitivity.

The Court: Well, you see it goes deeper than that. There are a lot of problems involved. There are two sides to that point. The government can well argue that this consent decree was framed intended to deal with real capacity and real capacity included in it the ability of these non-conspiratorial producers to actually make Melamine. That's a perfectly valid contention. It is something the Court has to face here.

On the other hand, when you are going to imply criminal sanctions perhaps the statute under which the conduct is interdicted, or, in this case, the decree, the statute has to be construed with care, so that is where your real conflict is coming here.

If we knew the answer to those questions we could get across all of this.

Mr. Murphy: There is another aspect of this that is of real concern to me and I hope your Honor has no worry here that we might have taken steps to initiate this procedure.

The Court: Well, please, gentlemen—off the record.
(Discussion off the record)

The Court: On the record.

Maybe you ought to begin your sentence again.

Mr. Murphy: I am quite agreeable, your Honor, in this case of United States against American Cyanamid as a matter of grace on the defendant's part to have Mr. Haigney and Mr. Satterfield and anybody else who represents a licensee present in the courtroom to indicate to the Court when they think questions or answers or documentary exhibits are comprising their proprietary data. And handle the matter as best seems indicated at that time.

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We have no wish to comprise their information and I am not competent to know what is and is not secret.

The Court: If I believe the objections are taken in good faith it will be my intention and purpose to sustain the objection because I don't believe that it is necessary to go into the way the process operates, or to go into secret aspects of the process, in order to try the case.

Now, if you think otherwise, I would like you to tell me, perhaps with reference to this Melamine Chemicals exhibit which has been marked monthly operating data starting in March 1971.

Mr. Murphy: Well, let me give your Honor an example which I think is in that exhibit. I am not positive but I know that one problem MCI has which I assume its witnesses will testify to was lumps in the reactor. I don't know what that means but I do understand it is a problem. If they testify, MCI for example, that their plant could not perform to its contractual capacity because of lumps in the reactor, it will then be necessary for me to inquire and cross examination into the cause of the lumps, namely were they, on the one hand, caused by something inherent in the process, which may be MCI's contention, I do not know.

The Court: Do you get lumps in yours?

Mr. Murphy: Very seldom but occasionally. And on the other hand—

Mr. Haigney: There are detector systems—

Mr. Murphy: May I finish, please?

Mr. Haigney: I am sorry.

Mr. Murphy: On the other hand, were they caused by improper maintenance and improper adjustments of [type of equipment deleted] and if you don't take good care of them and keep out the scale and dirt and so forth instead of the [type of desired occurrence deleted] there is a [type of undesired occurrence deleted] and the [type of undesired occurrence deleted] makes a lump, that that is a secret Mr. Haigney would have to object at that time.

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If the witness has been allowed to testify on direct that he had a problem with the lumps in his reactor, then I would feel I would be entitled on cross to inquire as to why.

Mr. Haigney: And I would say at that point I would object that we would be there as a matter of grace.

The Court: You are there by the Court's direction. What Mr. Murphy has said is that he has no objection to the tentative ruling I have made.

Mr. Haigney: But assuming that we reach the point Mr. Murphy described and at that point I would want to be in a position to have a ruling as a principal to which I could take objection and seek whatever action that I could to protect the position.

The Court: But you see the defendant can present his point of view very readily without telling me what the lumps are of. Because his man can say, yes, I have lumps too, but I only get lumps very rarely. And the Court can be asked to draw the inference that if these people will have greater expertise they wouldn't get the lumps so often. But by the same token that doesn't help the defendant very much in this case. That's a pro government line of proof if I may so characterize it.

Mr. Murphy: Well, I am surprised that your Honor feels that way.

The Court: That's not a conclusion, it is just a question.

Mr. Murphy: I appreciate that your Honor from time to time keeps us advised of his thinking but the decree talks about production capacity and I suppose an issue in this case is going to be certainly—will be on these expert's testimony, whether that doesn't just mean the capacity of the plant rather than the ability of the people to offer it.

Now, if it doesn't then you might as well throw the word capacity out of the decree and read production.

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Mr. Sonnett: Your Honor, the government's approach has been and will be at trial that you view a plant where it is practical limitations—realistic limitations. After all, the design of these plants is only an estimation; it is based on scientific calculations, formulas, [type of chemical formula deleted], how much you are going to go through a day, and that after experience is developed that you become aware of the practical limitations of the plant.

Now, that is our approach to it and the practical limitations are that if you have lumps you are going to have lumps, that's a practical limitation.

If you are—and I think that Mr. Haigney will concede that I think these American plants are the first ones after your own, isn't it in Holland, to come on-stream?

Mr. Haigney: I think Premier was the first one and MCI and Cyanamid.

Mr. Sonnett: Cyanamid was number three. There are no experienced personnel, your Honor.

Mr. Murphy: That's not so.

Mr. Sonnett: Basically in the process.

Mr. Haigney: We had resident engineers who we—

Mr. Sonnett: That's a practical constraint on the part of the plaintiff to produce Melamine.

Mr. Murphy: Your Honor, if I may make another suggestion that I am bothered by the fact that we are here dealing with the case of Stamicarbon against Cyanamid and I didn't want to take the Court's time because I thought this was being resolved but I do want to make clear that I don't think Mr. Haigney's complaint states a cause of action.

The Court: Off the record.

(Discussion off the record)

The Court: On the record.

Mr. Haigney: I think we ought to be precise as to what the alternatives are that are before us.

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Your Honor, I would like to be clear in my own mind with respect to the alternatives that we have been discussing and among which we may choose. The procedure as suggested by your Honor is that Stamicarbon be present in the courtroom with engineering representatives if necessary, and whenever testimony or evidence is being elicited or presented which the Stamicarbon believes impinges upon its know-how, secret know-how, it would then have the opportunity to raise the objection in the sense of stating to the Court that it now feels that it is getting into this guarded information. At that point the Court may determine to exclude the question on the ground of relevance or the Court may rule that it is relevant and although it is a secret will allow the witness to answer.

The Court: Well, of course we are dealing here with a criminal case, Mr. Haigney, as I have made clear to you in my prior discussions. My present view of the case is that a question which would actually elicit secret material is irrelevant and outside the scope of the inquiry.

However, I cannot, particularly in a criminal case, make a ruling in advance. It is my speculation, as I view this case, that it would never become relevant, and therefore, if the objection were taken in good faith, as I assume it would be, I would be inclined to sustain it. It would have to be made clear to me and I would permit you in argument in the robing room on this score to show that the objection is taken in good faith.

I can conceive that your client may regard some things as secret or guarded information which really are not. The example which we have been discussing on an off the record basis, for example, that ammonia is used in connection with the process. As I pointed out to you a child observing the plant from a distance could see the ammonia coming in in tank cars on the railroad. So I wouldn't consider that fact secret, although certainly the pressure under which it is introduced or the heat level at which it is introduced or

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the stage in the process at which it is introduced or the means would all probably be secret.

Mr. Haigney: Yes.

The Court: Now, that is the basis on which I expect to proceed in this matter. I have two countervailing interests, one is to protect the rights of the accused to full and fair cross examination and the other is to protect your secrets which they are each bound to observe.

The government has received your secrets indirectly and agreed to observe the secrecy, isn't that true, Mr. Sonnett?

Mr. Sonnett: It has been transmitted, your Honor, information has been transmitted to J. Lyle Reed, who we will call as witnesses under a pledge of confidentiality.

The Court: Now, if that procedure is not satisfactory to your client my next step here will be that I will make a finding that that suggested procedure which the Court has imposed and which the defendant has not objected to protects you satisfactorily, you therefore have no irreparable damage in this hearing. And if need be, I have indicated to you before that if you and your client don't believe the Court is correct in that regard, I would give you a limited stay solely to permit you to apply to the Court of Appeals for a stay. I would think that if I gave such a stay it would be no more than one or two days just to give you a chance to draw your papers.

Mr. Haigney: Yes, your Honor. I was trying to visualize the possibility that as the case proceeds that your Honor may feel that it may be relevant that there be an answer to the secret process. I am not clear as to what happens at that point.

The Court: Well, I think we are in a hypothetical area but I think we would be in a situation where unless the gov-

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erament stipulated to discontinue, I would have to direct that he answer. If in truth it is relevant on the question of innocence or guilt. But you are asking me to hypothesize something which on the present record I am unwilling to assume.

Mr. Haigney: We are attempting to describe a procedure that I can hopefully accept.

Now, what I—the procedure as I see it is that it is entirely possible that your Honor could find it relevant, direct the answer, the secret will be out.

The Court: Will this be your witness we are talking about here?

Mr. Haigney: Not necessarily. No.

The Court: These are any possible witnesses including Dr. Reed.

Mr. Haigney: I am just standing there waiving my arms under this procedure and the answer is going in. It is not in camera.

The Court: I cannot delegate to you the Court's power and privilege to make a ruling on relevance.

Mr. Haigney: Of course you are not. All I can suggest is that with respect to this order to show cause that it be held in suspense until we reach that possibly important point. On the other hand, we may never reach it, but do not deny my motion now, I will renew my motion at that point.

The Court: I am reluctant to proceed in that fashion because if I were persuaded that the answer had to be given, it is highly unlikely that I would find any merit in your application for an order to show cause, and I would then be in a much worse position so far as giving you a temporary continuance of all the proceedings to permit you to seek appellate review.

Because what you are seeking here is that I alternatively compel a secret trial and I am reluctant, although I have read this morning most of the cases cited by you and I

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don't consider them apposite, and I am reluctant to declare a secret trial over the objections of any party.

So that you would put me in a different situation where jeopardy has attached, where a criminal trial is in process and you then want a couple of days to seek a stay on appeal. And I think that the picture would be much different then than if I were to permit you to have a continuance and stay for that purpose now.

Mr. Haigney: But you see I would be appealing from a denial of my motion at that time in the context—

The Court: To declare a secret trial.

Mr. Haigney: And to do it at that time in the context of a question and answer. Here to deny it—

The Court: I don't think I could do that. I would be reluctant to do it. Because the balance of equity is different then you see.

We have a criminal trial in progress with jeopardy attached.

Mr. Haigney: I believe that under the circumstances we ought to go ahead then with the hearing on my application.

The Court: Well, you all wanted a recess to talk to your people and I certainly will give you that. I will resume in approximately ten minutes.

Mr. Murphy: Your Honor, may I take up a housekeeping matter in view of the stretch of time?

As the Court requested I have in the courtroom a vice-president and general counsel of Cyanamid. Because of the provision of Rule 43 I had not alerted Cyanamid of the necessity of having a corporate officer, and I am embarrassed to find that this week, tomorrow and Wednesday there are two extraordinary corporate meetings.

I wanted to ask if we could be excused from having an officer present from the Noon recess until Thursday.

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The Court: I certainly have no objection to that. I see no difficulty over that.

Mr. Murphy: Thank you very much.

Mr. Haigney: May I inquire as to also a housekeeping matter, it may be more than that. If I have to go forward with the proof of my case it would involve fundamentally the presentation of the agreement, the secrecy agreement between Cyanamid and Stamicarbon.

The Court: He concedes there is a secrecy agreement.

Mr. Murphy: I say it has nothing to do with your case.

Mr. Haigney: Pardon me. It has to do with my notion of my case, let's say.

I have shown him the agreement this morning that I would like to offer. I have a xerox copy. I am not in a position in view of the shortness of time to have someone—

The Court: Go confer with your respective clients and with each other. I will not permit minor difficulties such as whether it is a xerox copy to prevent your making a full record with me.

Mr. Haigney: Thank you.

(Recess)

(In the robing room)

Mr. Haigney: We see no alternative but at least to put in our proof for a record with respect to the complaint, and I talked to Mr. Murphy who agrees that we can really shortcut this in the sense that he does not object to anything stated in our complaint except that he doesn't believe it constitutes a cause of action.

The Court: Well, I am prepared to make findings on the record for you if that is your wish; if you want to go forward in that regard. Of course, I will make them outside in open court.

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Mr. Haigney: All right.

The Court: Is there nothing else that can be done of a practical nature here?

Mr. Murphy: I am sorry.

The Court: You don't want to start your trial.

Mr. Murphy: Yes, I do. On the basis of the sort of procedure that your Honor has suggested. But I would want Mr. Haigney to be in court as I put it from our point of view as a matter of grace. I would object to his being in court on the basis of his papers.

The Court: Well, I would let him be in court based simply on it, what I understand to be the undisputed facts. If his presence in court, and I only say this to complete my point of view, not because of any suggestion that it would happen that way, if his presence in court disrupts the criminal trial, I would exclude him. But I would permit him at any time the testimony is being received about capacity to sit there with his engineer and attempt as best he can to protect his secrets. And I think the Court has the power to do that even against your wishes not just a matter of grace.

All right, we'll go out there and I assume I will have to give you a continuance while he consults the Court of Appeals.

Mr. Sonnett: Your Honor, what is the government's status in this particular matter?

The Court: I will permit you to appear in this particular matter if you want to apply for it. If you want to just stay out of it, that's your privilege also.

Mr. Sonnett: Yes, I believe so, your Honor. It is my comment that we would prefer, the government feels that this would be a burdensome and improper—not improper but to our disadvantage to have Mr. Haigney have the suf-

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ficient standing to make objections to questions and that the criminal case should proceed untrampled by third parties.

The Court: I think that is within my discretion to permit him to do that. I propose to make an order along those lines.

If you want to be a party to the proceedings which I understand Mr. Haigney will initiate immediately in the Court of Appeals you would have to make application to be admitted to the record in this action and I, of course, would grant it.

Mr. Sonnett: Your Honor, I don't believe that we would want to be part of this record.

The Court: All right. Well, I think what I would do, I would continue the trial until tomorrow with the thought that perhaps it may all be resolved. He may go up there and they may either grant a stay and order an expedited appeal or not. If they don't I am going to go right forward and not lose any time. Is that all satisfactory to you?

Mr. Murphy: Yes, sir.

Mr. Sonnett: That's fine, your Honor, since we have out-of-town witnesses.

The Court: That I can't help, Mr. Sonnett and I am reluctant to start a trial unless I get a concession from the defendant that I may do so while this other matter goes. Because you might get a long continuance in the middle of the trial and that might raise due process questions.

Mr. Haigney: Your Honor, I intend to proceed expeditiously. I guess the only thing I need be concerned about is how fast I can get the transcript of the—

The Court: Well, I know that's a problem. Now I will take your jury trial waiver for the record outside today. So that when the matter is in the Court of Appeals they will recognize that it is a non-jury trial here.

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Mr. Murphy: Fine, your Honor.

The Court: All right.

(Unsealed at this point)

(In open court)

The Court: In connection with Stamicarbon against American Cyanamid Company, civil action, I will permit you, Mr. Haigney, to offer your agreement for secrecy.

Mr. Haigney: Your Honor, the agreement of secrecy is incorporated in an over-all license agreement. That section of the license agreement with Cyanamid, the defendant, is attached to the complaint served in this action, and it I think appears as the only exhibit.

The Court: Is there anything else that you wish to supply the Court?

Mr. Haigney: Your Honor, I think Mr. Murphy has been very helpful in shortcutting the proof here with respect to our complaint and I think will agree that he has, or on behalf of his clients, that he does not deny any of the allegations of our complaint but does not concede that the Court has either jurisdiction or that we have stated a cause of action. And if Mr. Murphy would give us that admission I think it will be unnecessary to put in any further proof.

The Court: Well, I wouldn't require him to concede a legal conclusion.

Mr. Haigney: No, I am not asking—

The Court: Do you want to be heard any further before I make findings and conclusions with respect to Stamicarbon's application for a preliminary injunction pending trial?

Mr. Haigney: One other thing. For the record the order to show cause before your Honor was duly served

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upon the defendant. The defendant has appeared by the firm of Donovan, Leisure; it served a memorandum of law on Saturday or Sunday in which it formally designates itself as counsel for the defendant, so I think jurisdiction has been required. I would also ask that as part of the record, that the order to show cause be made a part of the record although probably it would be in any case.

The Court: It is. It is.

Mr. Haigney: Attached to that order to show cause is also an affidavit by me, and I believe that Mr. Murphy would also agree that he does not dispute the facts alleged in that complaint. Or, that affidavit, and I think that would constitute the plaintiff's proof.

The Court: All right. Mr. Murphy you may be heard.

Mr. Murphy: I ask that the complaint be dismissed and the motion for an injunction denied on the grounds that the complaint fails to state a claim. I quite agree that the secrecy provision which is part of Mr. Haigney's papers is part of a contract between his client and mine. It, of course, simply limits my client's disclosure of information in its possession and has nothing to do with its examination or cross examination of witnesses in this court.

Finally, your Honor, I have filed this morning a very short memorandum of law pointing out that except for extraordinary situations where the public interest is involved, such as skyjacker profiles and the like, we have a constitutional right to a public trial.

The Court: Well, that Bell case is not apposite at all that is a—we are talking about a criminal trial here.

Mr. Murphy: That was submitted in response to—

The Court: We don't need to go into that.

Mr. Haigney: Your Honor, on the Bell case although it was a suppression proceeding it was agreed that it would constitute a trial. I don't think that is a distinction I—

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The Court: You can't make a hearing into a trial just by agreeing on it, can you?

Mr. Murphy: Unless your Honor has any questions of me I have nothing further to say on the motion.

The Court: Well, all right. I will now * make my findings and conclusions with respect to the preliminary injunction motion. I am declining at this time to hear your motion, Mr. Murphy, to dismiss the complaint. I would prefer to take that later on papers if need be. But I would prefer to deal at this time with the motion for preliminary relief.

The Court finds the following facts:

* That the defendant American Cyanamid Company purportedly entered into a consent decree in 1964 in this court and has been charged by an order to show cause issued by this Court with having violated essential terms of that decree in 1972 and it is alleged in the underlying proceeding bearing docket No. 60 Civ. 3857 that defendant American Cyanamid admitted committing a criminal contempt against this Court's—in disobedience to this Court's lawful decree by manufacturing more Melamine than it was permitted to do under the decree, at a time when the industrial capacity of nonconspiratorial producers of Melamine did not reach the quantum set forth in decree.

The defendant American Cyanamid has denied any criminal liability and has pleaded not guilty.

The Government in presenting the order to show cause why American should not be adjudged guilty of the criminal contempt pursuant to Rule 42-B indicated to the Court that it was demanding a fine or penalty in excess of \$500.

The Court concluded that the defendant was entitled to all of the procedural rights which were conferred on persons charged with contempt by the recent decision, Dellinger in the Seventh Circuit 461 Fed. 2nd 389 decided in May 1972, and Seale in the same circuit 461 F. 2nd 345, and

* [added] In the record, the word "not" is typed but the word "now" is written above it in pencil.

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among the rights and privileges conferred on the defendant would be the right, the constitutional right to public trial.

At issue in this trial will be the amount of capacity in the industry in 1973. The plaintiff in this action, Stamicarbon is the owner of certain secret processes which were licensed to American Cyanamid and several of its competitors. Each person with knowledge has agreed to keep that knowledge inviolate as a trade secret or secret process.

In addition the Government's expert witness as the Court understands it has been permitted access to secret materials and has agreed to keep those secrets and not disclose them, although he has used his understanding of the secrets to reach an ultimate conclusion as to what independent industry capacity was and as to how independent industry capacity ought to be measured.

The Court has jurisdiction over the parties in the subject matter to entertain this application for injunctive relief.

The Court concludes that the plaintiff Stamicarbon would be irreparably damaged if the secrets were disclosed. The Court believes however that it is possible to try this case limiting our inquiry to matters which are relevant and without unduly limiting the defendant's right of cross examination, without necessity of getting into the secret process, or disclosing on the trial record anything which is secret.

The Court has set forth a procedure for protecting secrets. I will not dwell on it in detail because it is already set forth in the record. But essentially the Court would permit Stamicarbon to be present during the trial at all times when reference is being had to the secret processes and to be permitted to raise objections on the record with respect to any question which in the opinion of Stamicarbon or its counsel or its engineers might call forth an answer which would disclose an element of privileged secrecy.

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The Court would expect that if such a question were raised that it would probably be withdrawn in the face of the objection and that if the person asserting it declined to withdraw it that the objection could most likely be disposed of on the grounds of relevance and that the secrets are not relevant, they are not an essential part of the prosecution of this claim or an essential part of the defenses available to the defendant in this matter.

The defendant American Cyamid Company has indicated a willingness to try the contempt matter on a waiver of jury. Although a formal stipulation to that effect hasn't been filed the attorneys have told the Court not to send for a panel this morning, we were scheduled to begin the trial, because the jury trial right would be waived.

Defendant declines to waive its right to a public trial. The Court cannot rule in advance as to whether material could be relevant. It is possible, it is not inconceivable, that there might be a question which would arise in cross examination of the expert or in some other fashion which might call for a responsive answer which could disclose a secret process.

The Court thinks that highly unlikely but cannot predict in advance what the outcome might be. The plaintiff here, Stamicarbon, is in no position to protect its secrets in the event the Court rules erroneously. That is to say if the Court should determine that an objection is not taken in good faith and that the answer is not likely to elicit secret material then the witness would undoubtedly answer and in that case Stamicarbon might be irreparably damaged.

Furthermore, the Court is unwilling to make a blanket determination that there is no circumstance under which in this trial an element of the secret process could ever become relevant. Rulings on relevancy can only be made when there is an actual issue, or question before the Court.

There is a further problem in that some of the people possessing the secret are not united in interest with Stami-

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carbon and therefore would not, I suppose proceed to test their ability to give an answer by submitting to coerce civil contempt which would be the order procedure open to the Court in the event that a witness wanted to test the validity of the Court's ruling.

Notwithstanding all these factual findings I conclude as a matter of law that under the circumstances of this case charged as it is with the crime of criminal contempt to which, I believe the cases of course in our circuit don't quite go that far but I think that the general philosophy of the Dellinger case and the Seale case will become the law in the entire country, if it is not already so, defendant has its right to a public trial and the Court has to balance the right to a public trial on the one hand with the right to have the secrets preserved on the other and believes that the Court lacks power under the circumstances of this case, and at this stage of the proceedings or indeed at any time to compel the defendant American Cyanamid Company against its wishes to submit to having all or part of the trial in camera.

And the Court believes that those cases which have permitted exclusion of particular persons from the room or have permitted exclusions of persons who were threatening a witness or who were disorderly, and further that the case about the—the Bell case involving the profile of hijackers of aircraft is distinguishable because the Court views that as a hearing on a preliminary motion being different than a criminal trial.

The Court regards this proceeding, this underlying proceeding as a full criminal trial which the defendant will be entitled to all of the presumptions and rights to which any other criminal defendant is entitled, and deems itself without power to deprive the defendant of a public trial even if is conceivable that the process secrets might become relevant.

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The motion for a preliminary injunction is denied on the foregoing grounds. The foregoing constitutes findings and conclusions under Rule 65. Since I believe myself without power to grant the remedy requested, or any further remedy than I have granted already and which is set forth previously in the record, I do not deal directly with whether the complaint states a claim. I think it is clear that there is irreparable damage on the possible picture which has been made, namely that an answer might be relevant, and that the Court might compel an answer, or the further possibility that the Court could be wrong as to whether the question is likely to elicit secret material in the answer. And I will say that the complaint within the context of our decided cases about the preliminary relief does contain fair grounds for controversy and does submit a litigable question.

Now before concluding my findings and conclusions if there is anything I have left out or which you consider inadequate, you may call my attention to it now. I will give you a reasonable time to seek a stay from the Court of Appeals. I should think that two days is enough. If you can do it in less time I would appreciate it if you would do that so I can proceed with my trial. Because I am going to have to continue this criminal trial in order to let you get this matter reviewed. If they grant a stay pending appeal and give you an expedited appeal, the criminal trial will have to go over until the fall. And I want to say to you, sir, that both the Cyanamid Company and the Government bent every effort to get this matter disposed of promptly, there has been no footdragging, everybody has attended promptly and they are really ready to go to trial today.

So you will be placing a hardship on both the parties in the underlying case if you cause it to be delayed any

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longer unduly. Now is there anything else you want to have found or ruled upon to permit you to have a full record?

Mr. Haigney: Your Honor has covered everything that we had in mind and we would, your Honor, we will proceed as expeditiously as we can. The only thing that is not within our control is the production of the record—

The Court: He will do the best he can for you.

Mr. Haigney: Yes, I know he will.

The Court: Start drafting your papers to apply—

Mr. Haigney: Thank you.

The Court: Mr. Murphy is there anything you would like to have added to the record?

Mr. Murphy: Not a thing, your Honor, thank you.

The Court: All right.

Now, I am going to go on the record briefly in the underlying case of the United States against American Cyanamid.

Notice of Appeal

[SAME CAPTION]

Notice is hereby given that Stamicarbon N.V., plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the order of the United States District Court, Southern District of New York, by Judge Charles L. Bricant Jr. thereof, denying plaintiff's motion in this action for a preliminary injunction enjoining defendant during the pendency of this action from failing or refusing to consent that such part of the trial of criminal contempt proceedings brought against it by the United States of America in 60 Civ. 3857 in that Court, as may involve disclosure of information relating to a process for manufacturing melamine licensed by plaintiff to defendant be conducted *in camera*, so that the secrecy thereof be preserved, which said order denying such motion was entered in this action on July 15, 1974.

Dated: New York, N.Y.
July 16, 1974

IDE & HAIGNEY
Attorneys for Plaintiff [Etc.]



Service of one copies of the
within Joint Appendix is hereby
admitted this 14th day of
August 1974

Signed _____

Attorney for Defendant - Appellee

COPY RECEIVED

AUG 14 1974

DONOVAN LEISURE
NEWTON & IRVINE